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Mortgages on immovables in Dutch law in comparison to the German mortgage and land charge¹

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1. Introduction

Unlike German law, Dutch law only knows one type of security interest in immovable property: the right of *hypotheek* (mortgage). The Dutch *hypotheek* is a limited real right burdening the immovable property (Art. 3:227 BW²). It is not a transfer for security purposes. Dutch law does not allow such a transfer. The so-called fiducia-ban of Art. 3:84(3) BW renders a transfer for security purposes void.

In practice, the Dutch mortgage gives the mortgagee a very high rank as against other creditors, in and outside the mortgagor's insolvency. It even has priority over the preference of the tax authorities and in many insolvency procedures, most of the money left is distributed among the mortgagee(s) and the tax authorities.³ The mortgagee is able to organise a forced sale of the property within several months. In order to organise such a forced sale, no court order or permission is needed. The mortgagee should appoint a certain notary who will lead the forced sale (Art. 544 Rv⁴). In principle, the forced sale is a public auction, but the mortgagee or mortgagor may ask for permission of the court to sell the property in a private sale (Art. 3:268 BW).

Here I will outline the rules on the creation of mortgages and then focus on one of the most characteristic principles of Dutch mortgage law, the principle of accessoriness. In order to illustrate how the principle works I will, at two points (§ 3.8 and § 4), briefly compare the Dutch mortgage to the German *Hypothek* (mortgage) and the German *Grundschild* (land charge).

2. The creation of a mortgage

2.1. Requirements for the creation of a mortgage

The rules on the transfer of property apply *mutatis mutandis* to the creation of limited real rights (Art. 3:98 BW). As a result, the creation of a mortgage requires (1) a legal act of creation, (2) based on a valid legal ground, and it requires that (3) the mortgagor has the right to dispose of the property (Art. 3:84 BW).

The legal act of creation is a so-called real agreement (*goederenrechtelijke overeenkomst*) in which the mortgagor declares that he is giving a right of mortgage to the mortgagee and in

¹ I am grateful to Dr. T. Fest (University of Munich), Prof. G.L. Gretton (University of Edinburgh), Prof. dr. M. Hinteregger (University of Graz) and Dr. A.J.M. Steven (University of Edinburgh) for their helpful comments on a draft of this paper.

² The abbreviation "BW" refers to the Dutch civil code, the Burgerlijk Wetboek of 1992.

³ The tax authorities' right of preference is laid down in Art. 21 Invorderingswet 1990. The mortgage has priority over this preference on the basis of Art. 3:279 BW.

⁴ The abbreviation "Rv" refers to the Code of civil procedure.

which the mortgagee declares that he accepts this right.⁵ In order to be valid, the real agreement must be accompanied by the fulfilment of certain formalities. It requires to be embodied in a notarial deed drawn up between the parties in which a mortgage is granted to the mortgagee. It must then be registered in the public land register.⁶ Without the fulfilment of these two formalities the mortgage is invalid, not only against third parties but even between the mortgagor and mortgagee.

The legal ground will normally be an obligation to grant security laid down in the contract of loan. If the contract of loan which constitutes the legal ground is void from the outset, the mortgage is void as well. If the contract is avoided with retroactive effect, the mortgage also lapses with retroactive effect. In these two cases (a void and a voidable contract) the mortgage will be void even if it has already been registered in the public land register.⁷ Such a system of creation of limited real rights is called a *causal* system, because the creation of a limited real right requires a valid *causa* or legal ground.⁸

2.2. Publicity of the mortgage

We have just seen that the mortgage is invalid without registration. Registration means that all the information in the notarial deed is accessible to the public. The public land register is open to everyone. To check the register, the payment of a nominal fee suffices. No permission of the owner of the burdened property is needed, nor is it necessary to show any reasonable interest in inspecting the register.

The land register gives more information than the mere fact that a plot of land has been burdened with a mortgage. First of all, it shows the name of the mortgagee. Secondly, the notarial deed has to specify the secured claim, or at least the facts necessary to ascertain the secured claim. Thirdly, the notarial deed must mention the amount of the secured claim, or, if the amount is not yet determined, the maximum amount (Art. 3:260 BW).

3. Accessoriness⁹

3.1. What is accessoriness?

Accessoriness or accessory¹⁰ refers to the link between the security interest and the secured claim. If the repayment of a loan of €300.000 is secured by creating a mortgage in favour of the lender, the mortgage is connected to the repayment claim. The mortgagee has two separate rights: a personal right, i.e. the claim against the debtor, and in addition the real right of mortgage. As the mortgage solely serves to secure the repayment of the debt and the mortgagee has no reasonable interest in the mortgage without a secured claim against the mortgagor, the mortgage is inextricably linked to the claim it secures.

⁵ See also L.P.W. van Vliet, *Transfer of movables in German, French, English and Dutch law*, Ars Aequi Libri, Nijmegen 2000, ch. 5 § 2.

⁶ Art. 3:89 BW and Art. 3:260 BW.

⁷ There are, however, provisions protecting bona fide third parties.

⁸ In the case of transfer of ownership, this *causa* is called the *causa traditionis*.

⁹ See for a thorough English language treatment of accessoriness A.J.M. Steven, *Accessoriness and security over land*, (2009) *Edinburgh Law Review*, vol 13.

¹⁰ As the term is unknown to English law, there is no obvious translation. These two varieties have developed: accessory and accessoriness. English law does have a term for accessoriness in land law where it expresses the notion that a right runs with the property. Such a right is called an *annexed* right. An example is an easement (servitude), which is annexed to the dominant land.

The bond between mortgage and claim has several consequences, the most important of which will be treated below. For practical reasons many legal systems, among which Dutch law, allow an important exception to the principle of accessoriness in allowing the creation of a mortgage to secure future claims. This exception will be treated in § 3.10.

There is no single definition of accessoriness. There may be varying degrees of accessoriness, and security interests may be accessory in one aspect and non-accessory in another aspect. Dutch law only knows two security interests in the strict sense of the word, that is, security interests which are limited real rights. In addition, it acknowledges other ways of securing a claim, such as retention of ownership or sale and lease back. Traditionally it is said that of all the different ways of securing a money claim only the pledge and the mortgage are truly accessory. However, the Dutch mortgage is not 100% accessory because it can be created to secure future claims. This exception to the accessoriness is unproblematic.

A vital aspect of accessoriness, however, is the protection of the owner of the mortgaged land against a new creditor to whom the original creditor has assigned the secured claim and the security right. Is the owner able to set up against the new creditor the same defences he had against the original creditor? Or can the assignment lead to the owner losing his defences? I will call this aspect of accessoriness the accessoriness of defences.

3.2. *Can we do without accessoriness?*

The German civil code offers both the *Hypothek* (mortgage) and the *Grundschild* (land charge). In practice the *Grundschild* is used much more frequently than the *Hypothek*. There are two types of *Hypothek*, the *Verkehrshypothek*, a mortgage with lenient accessoriness, and the *Sicherungshypothek*, a mortgage with strict accessoriness. The *Verkehrshypothek* does not have full accessoriness of defences. The same applied to the land charge until 19th August 2008. Recent developments in German law have shown that the lack of accessoriness of defences may lead to severe problems. These recent problems arose as a result of the assignment of large bundles of claims secured by land charges. The developments have led to an amendment of the law which came into force on the 19th August 2008 and introduced full accessoriness of defences for the land charge (see § 3.8.2. below).

In the latter half of the 19th century the German legislator drafted the *Hypothek* as an accessory security and the *Grundschild* as a non-accessory security. However, even the non-accessory land charge has some link with the secured claim. When the land charge is used to secure a loan (*Sicherungsgrundschild*, security land charge) the law cannot do without any link to the secured loan. Whereas the bond between the loan and the accessory mortgage is a legal one, the bond linking the land charge to the secured loan is a contractual one. It is laid down in the so-called security contract (*Sicherungsvertrag*), a contract stipulating, among other things, the conditions under which and the manner in which the creditor is able to enforce his security interest. By doing so some sort of accessoriness is imitated by contract.

The benefits of genuine legal accessoriness are fully visible only when we compare the Dutch accessory mortgage to less accessory mortgages such as the German *Verkehrshypothek* and the pre-2008 German land charge. For that reason German law will be considered in order to see more clearly the contrast with Dutch law.

3.3. *Contents of security interest determined by secured claim*

As the Dutch mortgage merely serves to secure a claim, the contents of the mortgage are determined by the secured claim. If the claim is not yet due, the mortgage cannot be enforced. Secondly, the mortgage cannot be enforced for more than the actual amount of the secured claim. If the claim is reduced, for example as a result of a part payment of the loan or set-off,

the mortgagee will receive no more than the amount actually due to him under the secured claim.

The forced sale of the immovable property is organised by a notary. The buyer of the property pays the purchase price to this notary. From the proceeds of sale the notary will only pay to the mortgagee the actual amount due by the debtor and not the amount or the maximum amount mentioned in the notarial deed registered in the public land registers (Art. 3:270(2) BW). Let us say that the property has a value of €350.000 and that the outstanding loan, which was originally €350.000, now only amounts to €300.000. If the proceeds of sale are €350.000, the notary will first pay the costs of enforcement from the proceeds and then pay €300.000 to the mortgagee. The surplus of slightly less than €50.000 is paid by the notary to the mortgagor.¹¹ Unlike in the case of the pledge, where the buyer of the forced sale directly pays to the pledgee (Art. 3:253 BW), the mortgagor does not have an unsecured claim against the mortgagee for the surplus, but a claim against the notary.

3.4. Secured claim lapses

One of the aspects of accessoriness is that the security interest lapses when the secured claim lapses. The commonest way in which a claim may lapse is full payment of the claim. After payment of the claim the mortgage automatically lapses, although the mortgage is still registered in the public land register. The former mortgagor has the right to demand from the former creditor a declaration in notarial form that the mortgage has lapsed. This declaration can be registered in the public land register and allows the registrar to cross out the mortgage in the registration system.¹²

Here the principle of accessoriness prevents a person from enforcing a security interest by selling the burdened property in execution if he has no claim against the former mortgagor. Of course there are other ways of preventing this. A legal system could, for example, say that such an enforcement constitutes a tort or delict or it could give the owner of the burdened property a defence. The last approach is taken in German law for the land charge. In the case of a land charge the chargor has a defence and a claim against the first chargee that the latter should transfer the land charge to him (*Rückübertragungsanspruch*).¹³ The solution of tort or defence and claim for retransfer is the more complex solution. Lapsing is a more straightforward and thus more elegant solution. In that respect accessoriness serves the very important purpose of simplification.¹⁴

3.5. Secured claim is assigned

A second aspect of accessoriness is visible when the secured claim is assigned. Upon assignment the security interest follows the claim and the assignee becomes the new holder of the mortgage. The mortgage cannot be assigned separately from the secured claim. As the secured claim is regarded as the main right and the mortgage as its accessory, it is the claim which is assigned; the mortgage simply follows automatically. The reason for this is that the assignor has no reasonable interest in having a mortgage without having the secured claim. In addition the assignee has a reasonable interest in acquiring the mortgage in addition to the claim.

¹¹ Or in the mortgagor's insolvency to the trustee in insolvency.

¹² Art. 3:274 BW and Art. 35 Kadasterwet.

¹³ P. Bülow, *Recht der Kreditsicherheiten*, 7th ed., Heidelberg 2007, nr. 195-201. Note, however, that after the transfer of the land charge to a third party, the latter has no such obligation to transfer the land charge to the chargor. See C. Clemente, *Verwertung der nicht akzessorischen Grundschild im Rahmen eines Forderungsverkaufs*, *Zeitschrift für Immobilienrecht*, 2007, p. 741.

¹⁴ W. Brehm and C. Berger, *Sachenrecht*, 2nd ed., Tübingen 2006, § 16.35-37.

3.6. Accessoriness and the land register

When the secured claim is fully paid off, the mortgage lapses, without any change of the public land register being needed. Similarly, when the secured claim is assigned, the mortgage automatically follows the claim, without any entry in the land register being required. In both cases the public land register is no longer correct. The register can be corrected, but it will be incorrect for some time.¹⁵ This creates a danger for third parties in good faith. In how far should they be able to rely on the register? If a bona fide third party buys a secured claim and it turns out that the seller does not have a claim and a mortgage at all, because the claim and the mortgage have lapsed or have been assigned before, should the law protect this third party? The same question arises when the secured claim still exists in the hands of the seller, but the debtor has made partial repayments so that the sum owed by him is smaller than the amount or maximum amount indicated on the mortgage deed entered in the land register. Should the buyer be protected and acquire a mortgage for the full amount?

This clearly is a policy choice between two conflicting interests: protection of the debtor against the risk of having to pay twice, or at least more than he owes, and the reliability of the public land register. The protection of the third party in good faith inevitably leads to a hardship for the debtor: upon enforcement of the mortgage, the assignee, the acquirer of the mortgage, may receive more than the sum of the secured loan. Dutch law opted to protect the debtor and sacrificed the reliability of the land register to some extent. If at the time of the assignment the assigned claim does not exist or only exists for a lower amount than indicated in the contract between assignor and assignee, the assignee of the secured claim, the new mortgagor, will normally have a remedy for breach of contract against his assignor.

3.7. The mortgagor's position as against the assignee

As we have seen, the mortgage cannot be transferred independently of the secured claim. It is the claim which is transferred through assignment and, as a result, the mortgage automatically follows. The mortgage does not change in character or extent. The assignee, the acquirer of the mortgage, does not have more rights than the assignor. The mortgagor's defences which he had against the assignor will not be extinguished by the assignment of the claim. He will be able to set up these defences against the assignee (Art. 6:145 BW).

The mortgagor is also able to set up the defence of set-off against the assignee, provided the mortgagor's counterclaim arises from the same legal relationship as the assigned claim or had already vested in him and had already become due prior to the assignment (Art. 6:130 BW).

The accessory nature of the mortgage ensures that the assignee will not be paid more money from the proceeds of sale than the original mortgagee would have received, even if the assignee mistakenly believed that the secured claim was higher than it actually is. There is no third party protection for the mortgagee. He is unable to rely on the entry of the mortgage in the public land register.

Where the secured claim has been fully paid off prior to the assignment, there is no third party protection for the assignee. As the assigned claim does not exist, the assignee does not receive the assigned claim, nor does he receive the mortgage which was linked to the original claim. The mortgage has lapsed at the same time as the claim, even though the mortgage is still in the land register. Again, the third party cannot rely on the land register.

¹⁵ Under Art. 6:143(4) BW the assignee may demand from the assignor that he should cooperate in correcting the register. In order to correct the register, the assignor and assignee should give the registrar a notarial deed as proof of the assignment (Art. 26 Kadasterwet).

When we look at the third party effects of defences or part payments, we could say that the mortgage itself is almost an empty shell, and that its contents and scope are to a large extent determined by the secured claim and the contract from which the secured claim has arisen. The questions whether the mortgage can be enforced and how much from the proceeds is to be paid to the mortgagee are fully determined by the secured claim. In that sense the mortgage has no independent existence; it only adds powers to the secured claim.

3.8. The German mortgage (*Hypothek*) and land charge (*Grundschuld*)

3.8.1. The *Hypothek*

The favourable position of the Dutch mortgagor against the assignee is in sharp contrast to German law which protects the second mortgagor in these cases. We will first look at the German mortgage (*Hypothek*). Even though the German mortgage is normally described as being accessory like the Dutch mortgage, the level of accessoriness is not the same. As said before, there are two types of mortgage in German law: the *Sicherungshypothek*, which is more strictly accessory in nature, and the *Verkehrshypothek*, which has a more lenient form of accessoriness. Unless the parties to a mortgage expressly provide that the mortgage will be a *Sicherungshypothek* and enter this into the land register (§ 1184 BGB), the mortgage will be a *Verkehrshypothek*. In practice the *Sicherungshypothek* is hardly ever used for long term loans. Taking into account that German security rights on land hardly ever take the form of a *Hypothek*, it can be easily seen how rare a *Sicherungshypothek* is.

For the *Verkehrshypothek* German law has made a radically different choice than Dutch law in offering the bona fide assignee a very generous protection in § 1138 BGB.¹⁶ It is true that § 404 BGB provides that the debtor can set up his defences against the assignee, and that § 1137 BGB provides that the owner of the burdened property (this may be the debtor or a third party) can set up against the mortgage the defences which the debtor has against the secured claim. However, this rule is set aside almost completely by the rules on third party protection against facts which have not been entered in the land register (§ 1138 and 892 BGB). The mortgagor is able to rely on the entry of the mortgage in the public land register. If the secured claim is actually lower than the amount entered in the land register, the assignee is protected in that he is able to extract the registered amount from the property. In the case of enforcement, the sum entered in the land register is payable to the assignee. This protection is also offered if the claim has lapsed as a result of full repayment. The third party protection of § 1138 BGB does not restore the claim, but it ensures that the assignee should be paid from the proceeds of sale up to the amount entered in the land register.

The third party protection is withheld from assignees who *knew* of the true state of affairs (the lower amount of the claim, the non-existence of the claim or the debtor's defence). It is also withheld if the true state of affairs was entered in the public land register or if it was written on the mortgage certificate. However, if there was no such entry in the land register or on the mortgage certificate (such an entry is hardly ever made), assignees who did not know but *could and should have known* the true state of affairs are protected (§ 892 BGB).¹⁷ This latter group is the majority of the assignees. Often the assignee could and should have known that it is very likely that part of the secured claim had already been repaid, but they are protected

¹⁶ In order to facilitate the transfer of the mortgage, the *Verkehrshypothek* is normally in the form of a *Briefhypothek* (certificated mortgage) (§ 1116 BGB). If the parties agree not to issue a certificate, the mortgage is called a *Buchhypothek* (registered mortgage). The rules on third party protection equally apply to both kinds of mortgage. See D. Reinicke and K. Tiedtke, *Kreditsicherung*, 5th ed., Neuwied 2006, nr. 1085.

¹⁷ W. Brehm and C. Berger, *Sachenrecht*, 2nd ed., Tübingen 2006, § 17.102-17.107;

nonetheless. We should realise that any protection given to the assignee in these cases is to the detriment of the mortgagor. It creates the danger that he should pay more than the sum due by him under the loan contract. If a loan has been fully repaid, he could be forced to pay twice. This outcome is often defended by pointing to the fact that the false appearance of the land register has been created by the mortgagor and that the mortgagor should not be able to shift the risk to the assignee. The assignee should be able to rely on the land register, otherwise the refinancing of mortgages could be impaired.¹⁸ It was a deliberate choice of the German legislator at the end of the 19th century to give the assignee of a *Verkehrshypothek* such a wide protection.¹⁹

The third party protection of § 1138 BGB can be excluded by the mortgagor and mortgagee by opting for a *Sicherungshypothek* (security mortgage) (§ 1184 and 1185 BGB).²⁰ Normally this is only done if the parties expect that no assignment of the claim will take place.

3.8.2. The Grundschild²¹

The land charge, *Grundschild*, is often used to secure a claim (*Sicherungsgrundschild*, security land charge). It creates a claim payable from the land itself (§ 1191 BGB). This claim is separated from the claim it purports to secure and therefore does not share the fate of the secured claim. If the secured claim lapses as a result of payment, the land charge remains fully intact. The land charge can be transferred without the claim and the claim can be assigned without transferring the land charge, or both can be transferred to different persons.

At the end of the 19th century the German legislator created the *Grundschild* as a non-accessory security. Being non-accessory, the *Grundschild* by its very nature weakens the chargor's position. German law had to develop a very complex set of rules to counter this danger, and it has not fully succeeded in doing so. Over the last few years the sale by German banks of loan portfolios to hedge funds and other investors has created serious hardship for chargors of land charges.²² The legislator has reacted quickly to prevent such hardship by enacting the so-called *Risikobegrenzungs-gesetz*²³ (statute for the restriction of risks); it contains a large number of detailed piecemeal changes in various statutes. In the following I will only mention the change in the rules on the land charge. The changes came into force on the 19th August 2008.²⁴

¹⁸ W. Brehm and C. Berger, *Sachenrecht*, 2nd ed., Tübingen 2006, § 17.106 and 18.37; D. Reinicke and K. Tiedtke, *Kreditsicherung*, 5th ed., Neuwied 2006, nr. 1103, 1217 and 1220.

¹⁹ See Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das deutsche Reich, vol. III, Berlin/Leipzig 1888, pp. 602-603, 607 and 619.

²⁰ In the case of a *Sicherungshypothek* the assignee has no protection against the debtor's defences, but he does have protection against any defence the mortgagor may have against the mortgage itself, e.g. voidness of the act creating the mortgage. See P. Bülow, *Recht der Kreditsicherheiten*, 7th ed., Heidelberg 2007, nr. 254-259 and 364; D. Reinicke and K. Tiedtke, *Kreditsicherung*, 5th ed., Neuwied 2006, nr. 1106.

²¹ See in general W. Lücke, *Die Sicherungsgrundschild*, published in this book.

²² See C. Clemente, *Neuerungen im Immobiliendarlehens- und Sicherungsrecht*, *Zeitschrift für Immobilienrecht (ZfIR)*, 2008, p. 589-599, p. 590-591.

²³ Statute of 12 August 2008, BGBl I, 1666. See in general about this statute and its impact: P. Bülow, *Die Sicherungsgrundschild als gesetzlicher Tatbestand*, *ZJS* 1/2009, <www.zjs-online.com>; C. Clemente, *Neuerungen im Immobiliendarlehens- und Sicherungsrecht*, *ZfIR*, 2008, p. 589-599; T. Fest, *Eine Revolution der Kreditsicherung mittels Grundschilden, Auswirkungen des Risikobegrenzungs-gesetzes auf den Schuldnerschutz*, *ZfIR* 2008, p. 657-663; F. Hey, *Neues zu Sicherungsgrundschild und Darlehen im BGB – Gefahren für Darlehensnehmer bei Kreditverkäufen?*, *JURA* 2008, p. 721-726; Ph. Redeker, *Renaissance der Hypothek durch Abschaffung des gutgläubigen einrede-freien Erwerbs bei der Grundschild?*, *ZIP* 5/2009, p. 208-213.

²⁴ Art. 12 of the statute.

It is true that normally the lack of accessoriness is contractually repaired in the so-called *Sicherungsvertrag* (security contract), an agreement in which the parties stipulate under which conditions the chargee may enforce his right of land charge. One of the standard terms is that the land charge shall not be enforced for more than the actual amount of the secured claim and shall not be enforced as long as the debt is serviced according to the contract.

One disadvantage is that the law should intervene where the contents of the contract are disadvantageous to the debtor or where the parties omitted to include certain terms. To a large extent, German law dictates the contents of the security contract, for example by using the technique of implied terms and the provisions on voidness of surprising²⁵ or onerous²⁶ terms in general conditions and voidness of terms which are contrary to good faith²⁷. To give an example, the German Supreme Court held that the security contract obliges the chargee to pay any surplus money after a forced sale of the property to the chargor.²⁸ Similarly, the chargee must transfer the charge to the chargor if the secured claim has been repaid, and he must transfer part of the charge if the claim has partly been repaid.²⁹

Another dangerous disadvantage of this contractual link is that in principle it does not bind any transferee of the land charge (privity of contract).³⁰ If the original chargee does not bind his transferee to the same duties and conditions which bind him against the chargor, if he does not pass on the contractual accessoriness, the transferee will not automatically be bound. He will in principle be able to enforce the land charge for the full amount entered in the land register or written on the charge certificate.

As to third party protection, until the changes of August 2008 the transferee of a German land charge was protected in the same way as the transferee of a German mortgage. The transferee would normally acquire the land charge free of any defences for the amount entered in the land register or written on the charge certificate. In principle, the chargor was able to set up against the acquirer the defences which arise from the land charge (§ 1192 and 1157 BGB), but this rule underlay the generous third party protection of § 892 BGB. According to the German Supreme Court, the acquirer was always protected unless the defence had *already arisen before* the transfer of the land charge and the third party *knew* the defence.³¹ One of the ways to ensure that the third party knew was to enter the defence into the public land register or to write it onto the land charge certificate. This, however, was hardly ever done. An example of a defence which already exists at the moment of transfer is payment to the transferor before the transfer.

If under the old rules the land charge had been transferred to a third party and the debtor subsequently repaid the debt to the original creditor, the acquirer of the land charge could nonetheless enforce his land charge for the full amount. This is because the defence of full or part repayment did not yet exist before the transfer of the land charge. These defences are outside the scope of § 1157 BGB. This applies even if the third party knew of the payment.³²

²⁵ § 305 c BGB; BGH NJW 2002, p. 2710.

²⁶ § 307 BGB.

²⁷ § 242 BGB.

²⁸ BGH 21 May 2003, BGHZ 155, 63, NJW 2003, 2673.

²⁹ BGH 3 July 2002, IV ZR 227/01, NJW 2003, 45

³⁰ C. Clemente, Verwertung der nicht akzessorischen Grundschuld im Rahmen eines Forderungsverkaufs, *Zeitschrift für Immobilienrecht*, 2007, p. 737-746, p. 740.

³¹ BGH 21 April 1972, BGHZ 59, 1.

³² See E. Becker-Eberhard, *Die Forderungsgebundenheit der Sicherungsrechte*, Bielefeld 1993, p. 601; T. Fest, *ZfIR* 2008, p. 657-663, p. 659; Ph. Redeker, *ZIP* 5/2009, p. 208-213, p. 209-210.

We should bear in mind that the transfer of the land charge need not be communicated to the chargor or debtor.³³

If no transfer of the *Grundschild* takes place and the claim has been paid off, the chargor would have a defence against his chargee. The land charge cannot be enforced because such an enforcement would go against the security contract. However, under the old law the chargor's defences were virtually useless against a transferee of the land charge. Only recently financiers started to misuse this strange characteristic of German law.

Under the new rules of August 2008 the chargor is able to set up against the transferee of the land charge all his defences arising from the security contract.³⁴ It is immaterial whether or not the defence already existed at the moment of transfer of the land charge. To reach this result a new subparagraph 1a was added to § 1192 BGB. To give an example, both payments to the original chargee made *before* and *after* the transfer can be set up against the new chargee. For payments made after the transfer of the land charge this only applies if the chargor did not know of the transfer when he paid to the transferor (§ 407 BGB).

As a result of these changes the land charge is now by statute linked to the security contract and to the secured claim. Without a secured claim the land charge cannot be enforced, and it can be enforced only to the amount of the secured claim. The practical result is accessoriness at the moment of enforcement. Perhaps it would go too far to say that the land charge has now become an accessory security right. Although accessoriness of enforcement is one of the most important aspects of accessoriness, the structure of the land charge in the German civil code is still the original non-accessory structure. In this regard the changes of August 2008 were only piecemeal and did not rewrite the structure of the land charge. On the other hand, to call the security land charge (*Sicherungsgrundschild*) non-accessory would certainly be misleading. The *Verkehrshypothek*, which was not changed by the August 2008 statute,³⁵ is now less accessory than the security land charge. As we have seen before, upon transfer of the *Verkehrshypothek* almost always the mortgagor's defences are wiped out. The traditional labels "accessory" and "non-accessory" to indicate the link between the secured claim and the security interest is no longer of any use to describe the German *Verkehrshypothek* and *Sicherungsgrundschild*.

3.8.3. Comparison of the German mortgage and land charge with the Dutch mortgage

Although the German *Verkehrshypothek* is often called an accessory security right in contrast to the non-accessory land charge (*Grundschild*), we have seen above that the German *Verkehrshypothek* is much less accessory than the Dutch mortgage, and at the moment of enforcement even less accessory than the German land charge.³⁶ If we concentrate on the way in which the transferee of the mortgage is protected against the mortgagor, there is an important difference between the German *Verkehrshypothek* and the Dutch *hypothek*. In most cases,

³³ Some authors defend this outcome stressing that the chargor should have demanded a retransfer to him of the land charge. The chargor has the right to withhold his payment until the chargee retransfers the land charge to him. See e.g. P. Bülow, *Recht der Kreditsicherheiten*, 7th ed., Heidelberg 2007, nr. 300. Hardly any debtor would think of this.

³⁴ If the chargor is not the debtor the lender will normally enter into a separate security contract with the chargor, i.e. separate from the security contract between the lender and the debtor. The contract between the lender and chargor will then commonly contain the same defences as the contract between the lender and debtor. A strict interpretation of the new subparagraph 1a of § 1192 BGB would suggest that the chargor who is not the debtor is unable to set up the defences arising from the contract between the lender and debtor since he is not a party to that contract.

³⁵ The German *Hypothek* is hardly ever used in practice. The recent problems which arose in practice therefore all involved the *Grundschild*. For that reason the legislative reforms only targeted the *Grundschild*.

³⁶ This does not apply to the rare *Sicherungshypothek*.

the third party acquirer of a German *Verkehrshypothek* will be protected to the detriment of the mortgagor. The explanatory notes to the German civil code clearly recognise that the *Verkehrshypothek* can be independent of the secured claim, in other words, that it can be non-accessory. This fact is even used to justify the introduction of the then totally non-accessory land charge by saying that if a mortgage (i.e. the *Verkehrshypothek*) can be non-accessory *after* transfer to a third party, the civil code could also offer a land charge which is non-accessory *from the outset*.³⁷ The draftsmen thus recognised that in relation to the *Verkehrshypothek* the label “accessory” should be used with a pinch of salt.

It is indeed misleading to stress the fact that the German *Hypothek* is accessory. It creates the false impression that the German *Hypothek* is in essence comparable to the Dutch *hypotheek*. The label “accessory” obscures a vital difference. The difference between Dutch and German mortgage law is that the draftsmen of the German civil code made a radically different choice between the competing interests of the mortgagor and the transferee of the mortgage or land charge in generously protecting the latter. This choice has now been reversed for the German land charge in 2008, but it still applies to the German *Verkehrshypothek*.

In Germany, this choice had always been justified with the argument that if the transferee were not given this far-reaching protection, the refinancing of mortgages and land charges would be more difficult. Transferees would not easily accept mortgages and land charges if they were exposed to the danger that the mortgages or land charges cannot be enforced up to the sum indicated in the land register or the mortgage or charge certificate.³⁸ As in Dutch law their only remedy would be against the assignor.

Since refinancing in the form of securitisation is nowadays used in almost all countries, also in jurisdictions which offer no protection to the third party acquirer, this argument should be met with utmost scepticism. Apparently, the mortgagor’s protection in other jurisdictions is no serious obstacle to securitisation.

3.9. *Creation of mortgage before creation of secured claim*

Another aspect of accessoriness applies at the time of the creation of a security interest. Since accessoriness demands that no security interest can exist when there is no secured claim, the principle requires that at the time of creation of the mortgage the secured claim must already exist. As we shall see below, this aspect of accessoriness creates problems when the security interest is intended to secure future claims.

3.10. *Exceptions to the principle of accessoriness: future claims*

If the buyer of a house needs a loan from a bank in order to finance the house, he will get a loan for a fixed amount of money. The principle of accessoriness does not pose any problem here. From the outset the mortgagor has a claim for repayment of the money. In some cases, however, the mortgage is intended to secure a claim which does not yet exist, a future claim. A standard example is the so-called current account mortgage. The mortgagor allows the mortgagee a credit facility, i.e. the possibility to draw on the current account until a certain amount of credit, let us say €150.000. At the time this agreement is made, the current account may be in the black so that the mortgagor has a claim against the mortgagee. When the mort-

³⁷ See Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das deutsche Reich, vol. III, Berlin/Leipzig 1888, p. 607-608.

³⁸ See Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das deutsche Reich, vol. III, Berlin/Leipzig 1888, pp. 602-603, 607 and 619.

gagor needs credit he is able to draw from the account. By doing so he might draw his account into the red so that the mortgagee has a claim against the mortgagor.

There is a practical need to be able to create a mortgage before such a claim against the mortgagor comes into being. The lender would otherwise face the risk of having an unsecured claim. Dutch law allows the creation of a security interest to secure future claims, as long as the claim is determinable (Art. 3:231 BW) and the maximum amount is fixed (Art. 3:260 BW). In our example the claim is sufficiently determinable, because the claim arises from the contract granting the current account credit facility. Similarly, it is possible to grant a so-called bank mortgage which secures all present and future claims which the bank has or may acquire against its client, the mortgagor.

Since in the case of a bank mortgage the accessoriness is partly set aside, the question arises whether it is possible to extend the scope of the mortgage by assigning claims to the mortgagee. A practical example would be the following: A bank has a mortgage on a property worth €500.000. Its claim against the mortgagor is a mere €120.000. Since the mortgagor's insolvency is to be expected, the bank offers to buy unsecured claims from other creditors for a low price. Is the bank able to bring these assigned claims under the mortgage thereby upgrading the unsecured claims to the very high rank of the mortgage? In Dutch law the bank is unable to do so if at the time of the assignment the bank knew that the mortgagor's insolvency was to be expected.³⁹

4. Problems created by the principle of accessoriness

4.1. Preservation of rank

4.1.1. How to prevent a lower ranking right from moving up?

When two or more rights of mortgage burden the same property, the mortgages take rank according to the moment of their creation. The earlier mortgage takes priority over the later one (principle of priority). The moment of creation is the moment when the mortgage deed is offered to the registrar of the public land register (Art. 3:19 and 3:21 BW). Let us take the example of an immovable object with a value of €800.000 burdened with a first ranking mortgage for the sum of €600.000 (bank A) and a later second mortgage for €200.000 (bank B). Let us assume that according to the contract with bank A the owner and mortgagor is allowed to pay off his debt without paying a penalty. The mortgagor tries to receive a new loan from a rival bank (C) who makes a favourable offer provided that it receives a first ranking mortgage. With this loan the mortgagor could pay off his debt to A. However, the moment he pays off his debt to A, the first ranking mortgage extinguishes and the second mortgage moves up into first rank. Any mortgage created in favour of C would take a mere second rank.

German law intended to solve this problem by preventing the first mortgage from disappearing. When the loan of bank A is fully repaid, A loses his claim and his mortgage. The mortgage, however, does not lapse. It vests in the mortgagor, who now has a right of land

³⁹ HR 30 January 1963, NJ 1953/578 (Doyer en Kalff). This was a case about the transfer for security purposes which was permitted at the time. The result was reached not by reference to the principle of accessoriness but by using a provision from the Insolvency Act. Although that provision (Art. 54 Fw) does not apply in the case of a mortgage, the reasoning of the Supreme Court applies *mutatis mutandis* to our case. See also J.H. Dalhuisen, in: J.H. Dalhuisen and L.D. van Setten, *Zekerheid in roerende zaken en rechten*, Preadvies van de vereniging 'Handelsrecht', Deventer 2003, p. 19.

charge on his own property, a so-called *Eigentümergrundschuld* (§ 1163 BGB).⁴⁰ This is called the principle of fixed rank. At the end of the 19th century, when the German civil code was drafted, it was the prime reason for allowing an owner's land charge.⁴¹

Many civil law systems, following Roman law in this respect, do not allow an owner to have a limited real right on his own property. Ownership already gives its holder the fullest bundle of powers possible. A limited real right could not offer anything the owner does not already have. For that reason the limited real right lapses when it is acquired by the owner of the burdened property or when the holder of the limited right acquires the burdened property. In Roman law this process was called *confusio*. Even though the German solution infringes the traditional confusion rule, it does offer a welcome solution to the problem.

Dutch law does not follow this approach and does not allow the owner of the property to hold a mortgage on his own property. The solution which Dutch law offers is the possibility to alter the rank of C's mortgage so that it takes priority over B's mortgage. In theory the drawback of this solution is that B should agree with this change of rank (Art. 3:262 BW). In practice, altering the rank is done quite often and hardly ever leads to problems. As the lower ranking mortgagee suffers no loss by agreeing, he normally gives his permission.⁴² Where, however, the lower ranking mortgagee does refuse to cooperate, the law might be able to solve the problem by holding that if B would unjustly profit from the lapsing of the first mortgage, B would make misuse of his right if he did not agree to swap ranks.⁴³ This is, however, an inelegant solution which forces the mortgagor to start proceedings against bank B and gives the mortgagor the burden and risk of being able to demonstrate that in the given circumstances bank B makes misuse of its right to refuse permission.

An alternative solution would be to ask bank A to assign the claim to bank C. In this scenario the first ranking mortgage simply follows the assigned claim and no new mortgage is created. Bank B cannot move up in rank. Again, the theoretical drawback is that a third party, here bank A, must co-operate. In practice bank A would normally agree, because it will not suffer any harm. It has no interest in refusing its cooperation. The technique of change of rank, by the way, is also known to German law (*Rangänderung* § 880 BGB).

The legislator is able to solve the problem without taking recourse to the German solution of the *Eigentümergrundschuld* by enacting a provision that if a new first mortgage is created to replace the old first mortgage, permission of the inferior mortgagees is not needed as long as the new first mortgage is for the same secured sum or maximum sum as the old one. The German solution, however, has the theoretical disadvantage of partly setting aside the confusion rule.

What is more, in practice the German solution was undermined by lower ranking banks demanding in their contract with the borrower that, if the higher ranking mortgage or land charge turned into an owner's land charge,⁴⁴ the borrower must abandon his owner's land charge so that the lower ranking banks could move up after all. This right to have the owner's land charge removed (*Löschungsanspruch*) was commonly entered into the land register (*Vormerkung*) protecting it against third parties. Eventually, in 1977 this practice was codified in the German civil code in § 1179a BGB, which gives the lower ranking creditor a right to

⁴⁰ The *Hypothek* then becomes an *Eigentümergrundschuld* (owner's land charge). If the loan is only partly repaid, the mortgagor receives an *Eigentümergrundschuld* for the amount which he paid back. § 1176 BGB ensures that bank A's mortgage has priority over the owner's land charge.

⁴¹ Münchener Kommentar zum BGB, 4th ed., 2004, § 1163, Rdnr. 1 (D. Eickmann).

⁴² In the published case reports no case can be found in which a lower ranking mortgagee refused to give his permission.

⁴³ This approach is, however, not generally accepted.

⁴⁴ The land charge normally becomes an owner's land charge by the chargee transferring the charge to the chargor.

removal of the higher ranking owner's land charge. This paragraph also applies to the *Grundschuld* if the *Grundschuld* was previously held by a person other than the owner of the land (§ 1196(3) BGB). As a result, the system of preservation of rank was thus undermined.⁴⁵ One of the important reasons why German law had introduced the non-accessory land charge into the civil code had been taken away.

However, to solve this problem of lower ranking creditors moving up the owner of the land may stipulate in the deed creating a lower ranking mortgage or land charge that the holder of this lower ranking security has no right to demand removal of the owner's land charge (§ 1179a(5) BGB). In practice, however, German banks hardly ever accept lower ranking mortgages or land charges, so the ranking problem will hardly ever arise between two secured lenders.

4.1.2. Reserving a first rank for a future security right

When in German law the owner of land wishes to burden his land with a second ranking security right thus preserving a first rank for a security right to be created in future, there are two techniques to choose from. The first one is to create an owner's land charge (§ 1196 BGB) or to create a land charge in favour of a bank without there being a secured claim. This solution makes use of the fact that at the time of creation no link to any secured claim is needed. This owner's land charge does not underlie the statutory right to removal of § 1179a BGB. This right to removal is confined to owner's land charges that previously were held by someone other than the owner (§ 1196(3) BGB).

The second technique, however, does not depend on non-accessoriness and is called reservation of rank (*Rangvorbehalt* § 881 BGB). The chargor and chargee, or the mortgagor and mortgagee should agree that the land charge or mortgage may give way to a future land charge or mortgage. This agreement should be entered in the land register at the place where the second ranking charge or mortgage is entered.

In practice both techniques are used to reserve a rank.⁴⁶ The reservation of rank of § 881 BGB is cheaper and safer, as a future holder of the land charge certificate will never be certain that no one other than the land owner ever held the land charge.⁴⁷ If anyone other than the land owner has held the land charge, it will underlie the right to removal of § 1179a BGB. This statutory right to removal thus seriously hampers the usefulness of the owner's land charge.⁴⁸

The only disadvantage of the *Rangvorbehalt* is that it leads to complicated rankings when the land owner does not stipulate such a reservation every time a lower ranking limited real right is created and entered into the land register.⁴⁹ If not every lower ranking right underlies the reservation of rank the resulting complications may render the reservation of rank practically useless.⁵⁰ The problem should then be solved by a change of rank (*Rangänderung*), which requires the consent of the holder of the right which gives way.

⁴⁵ W. Brehm and C. Berger, *Sachenrecht*, 2nd ed., Tübingen 2006, § 17.127.

⁴⁶ In this regard German literature is contradictory, Waldner saying that the *Rangvorbehalt* is commonly used in stead of the *Eigentümergrundschuld* and Wacke claiming the opposite. See H. Prütting, G. Wegen and G. Weinreich, *BGB Kommentar*, 4th ed., Cologne 2009, § 1196 (W. Waldner), *Münchener Kommentar zum BGB*, 4th ed., 2004, § 881, Rdnr. 2 (A. Wacke).

⁴⁷ H. Prütting, G. Wegen and G. Weinreich, *BGB Kommentar*, 4th ed., Cologne 2009, § 1196 (W. Waldner).

⁴⁸ H. Prütting, G. Wegen and G. Weinreich, *BGB Kommentar*, 4th ed., Cologne 2009, § 1179a, Rdnr. 14 (W. Waldner); Staudinger/Wolfsteiner (2002), § 1179a, Rdnr. 65 and 68.

⁴⁹ Staudinger/Kutter (2007), § 881, Rdnr. 1 and 33-41.

⁵⁰ Staudinger/Kutter (2007), § 881, Rdnr. 41.

5. Conclusion

The Dutch mortgage gives a very high rank in the mortgagor's insolvency. It gives priority even over the tax authorities' preference. The Dutch mortgagee is able to organise a forced sale of the burdened property within a very short period of several months. The mortgage is accessory, that is, connected to the secured claim.

Accessoriness protects the debtor or mortgagor in a very simple and straightforward way. A comparison with German law shows how many difficulties arise and have to be solved if the accessoriness is (partly) taken away. The solution of these problems cannot be left to the parties involved, the mortgagor and the mortgagee. The law should impose its own rules because sometimes lenders cannot withstand the seduction to misuse their economic power and force unjust contract terms on the debtor. Gradually case law will give more clarity as to which contractual terms are acceptable, but this will take a lot of time. The lack of certainty will be detrimental to the debtors who cannot afford to start proceedings against their creditor.

Two of the main reasons to opt for non-accessory mortgages in Germany were the transferability of the mortgage and the possibility to preserve the rank of the mortgage. However, the first reason is unconvincing because securitisation takes place in many jurisdictions which do not have a non-accessory mortgage, such as Dutch law. The accessoriness does not seem to be an obstacle to the transferability of security interests. Moreover, practice has shown that the non-accessory nature of the German land charge gave rise to misuses harming chargors. As a result, in 2008 the German legislator had to make the land charge accessory in nature at the moment of enforcement. The second objective, preservation of rank, can be achieved without surrendering the principle of accessoriness.